FOR ARGUMENT

In the Supreme Court of the United States

October Term, 1976
No. 75-554

FRANK S. BEAL, Individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; ROGER CUTT, Individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; GLENN JOHNSON, Individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; JAMES A. DORSEY, JR., Individually and as Executive Director of the Allegheny County Board of Assistance; and the DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners

vs.

ANN DOE; BETTY DOE, a Minor by Her Mother as Representative, MOTHER B. DOE; CATHY DOE; DONNA DOE, a Minor, by Her Mother as Representative, MOTHER D. DOE; ELAINE DOE; JANE DOE, a Minor by Her Father as Representative, FATHER J. DOE; NANCY DOE; PATRICIA DOE; RUTH DOE; SYLVIA DOE; and TONI DOE, Each Individually and on Behalf of All Other Women Similarly Situated,

Respondents

Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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I. Pennsylvania's Medical Necessity Requirement as Applied to Abortion Does Not Violate Title XIX

Medical Assistance coverage in Pennsylvania is extended to the reasonable costs of various medical services, including abortions. However, each such service must be medically necessary at the time it is utilized in order to be covered.[1] In this case, some of the respondents sought an abortion for reasons unrelated to health[2]—and therefore, were unable to obtain the required certification of the procedure's medical necessity. Respondents themselves, admitted that in some instances ". . . continuance of the pregnancy did not threaten the health

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[1] For example, with respect to abortion, the Department of Public Welfare requires documentation ". . . that continuance of the pregnancy may threaten the health of the mother". (Petitioners' Br., p. 4)

[2] Other respondents appear originally to have been questioning only the Department's asserted failure to provide reimbursement for the medical examinations required by the regulations. This claim was never pursued on appeal, and, in fact was erroneous because the Pennsylvania Medicaid regulations clearly provided reimbursement for these examinations as any other necessary outpatient visit to a physician. M.A. Man. §9411 (Appendix I, Proc. Code 90080). Thus, Circuit Judge Weiss, dissenting in the District Court, correctly noted that "[t]he Commonwealth asserts that it does pay the fees of physicians to perform the preliminary examination and the contentions of the plaintiffs to the contrary appear to be in error." (108a)

or life of the mother." (33a) [3] Nonetheless, they claimed a statutory right to an abortion, contending that Pennsylvania's medical necessity requirement violated Title XIX.

However, respondents now apparently concede that a medical necessity restriction is permissible under Title XIX. In their brief they propose that if the petitioners ". . . acknowledge that the breadth of physicians' discretion on the abortion decision is the same under Title XIX as the Court enunciated in [*United States v. Vuitch,* 402 U.S. 62 (1971) and *Doe v. Bolton,* 410 U.S. 149 (1973)[4]], respondents concede that the state may legitimately interpose the attending physician between the woman's desire to abort and the services." (Respondents' Br., p. 4) Thus, the respondents now appear to contend that Pennsylvania utilized an unduly restrictive definition of that which constituted a "medical necessity" for purposes of medicaid coverage for abortions.

There are several problems with respondents' new approach.[5] First, even if Pennsylvania utilized an unduly

[3] By agreement of the parties, this affidavit, submitted by respondents' counsel, was accepted as true and admitted as evidence. (71a)

[4] In *United States v. Vuitch,* this Court noted, in the context of a criminal abortion statute, that the term "health" necessarily included both physical and mental health. Similarly, in *Doe v. Bolton,* it was pointed out that the physician's determination of the medical necessity of an abortion could be made in the light of a variety of factors: ". . . physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Id.* at 192. The Court recognized that ". . . [a]ll these factors may relate to health". *Id.*

[5] Respondents have never before conceded the legality of a medical necessity standard under Title XIX. Nor have they

restrictive definition or application of the term "health", which it does not,[6] respondents themselves admitted that, at least in some instances, health considerations, however defined, played no part in their decision to seek an abortion. See n. 3 and text *supra.* Secondly, it was not the petitioners who refused to document the medical necessity of the procedure—but rather it presumably was the woman's physician. Consistent with Title XIX it is the physician that determines the medical needs of the patient, not the Commonwealth.

Furthermore, the position which the respondents have now adopted is inconsistent with the reasoning of the lower Court. It was the majority's view that the petitioners could not, consistent with Title XIX, place *any* medical necessity requirements on its coverage for abortion. Judge Van Dusen concluded that:

> "Since the Commonwealth of Pennsylvania pays for full-term deliveries and also for therapeutic abortions, it is plain that the state has determined, in

ever questioned the petitioners' use of the term "health". Moreover, assuming that these women would have standing to question any restrictions the Commonwealth may have imposed upon the exercise of a physician's discretion in determining if an abortion is medically necessary, they have not done so in this case.

[6] The 1970 policy statement of the Pennsylvania Medical Society regarding abortion, which provided the basis for Pennsylvania's regulations, clearly demonstrates the latitude of a physician's discretion in this area: "If we take the example of an unwed pregnant female, the Pennsylvania Medical Society position well may permit an abortion to be performed if the three physicians specified agree that the female's emotional reaction to the social stigma that may be attached to becoming a mother is such that it poses a threat to her mental health." (81a)

its discretion, that pregnancy is a condition for which medical treatment is 'necessary' within the meaning of Title XIX. The next question is whether some justification can be found in the statute for preventting an attending physician from choosing nontherapeutic abortion as the method for treating a pregnancy. [Footnote omitted.] We can find none." (149a)

There simply is no room in that analysis for any medical necessity requirement as a prerequisite for funding abortions. An abortion which is "nontherapeutic" is, by definition,[7] not medically necessary, regardless of the meaning ascribed to those terms. Otherwise the therapeutic-nontherapeutic distinction is meaningless. Accordingly, the lower Court's holding that Title XIX requires medicaid coverage for nontherapeutic abortions necessarily precludes the imposition of any medical necessity requirement, at least where abortions are concerned. Nevertheless, the respondents themselves have abandoned this holding and conceded, to the contrary, that Title XIX allows the States to ". . . legitimately interpose the attending physician between the women's desire to abort and the services". (Respondents' Br., p. 4)

In addition to respondents' own views on the question, recent actions by Congress cast further doubt on the validity of the opinion of the Court of Appeals. On September 30, 1976, Congress enacted the Departments of Labor and Health, Education and Welfare Appropria-

[7] The term "therapeutic" is defined as, "[o]f or relating to the treatment of disease or disorders by remedial agents or methods: curative, medicinal". *Webster's New International Dictionary* (3rd ed., 1968).

tions Act for fiscal year 1977, p. 2.94-439, of which section 209 provides:

> "None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term."[8]

Although this evidence of Congressional disfavor with Medicaid funding abortions is not controlling, it is certainly another persuasive indicator that, *sub silento,* Congress would not have *mandated* medicaid coverage for nontherapeutic abortions.

[8] This appropriations act has not rendered this case moot, or in any way altered the issue in this appeal. First, Title XIX, the meaning of which constitutes the sole focus of this appeal, remains unchanged. Second, this appropriations act expires one year from its effective date. See *Bullock v. Carter,* 405 U.S. 134, 141-2, n. 17 (1971); *Flemming v. Florida Citrus Exchange,* 358 U.S. 153, 167-8 (1958). Third, the temporary nature of this measure, coupled with the fact that the Act has been enjoined nationally (*McRae, et al. v. Matthews, et al.,* appeal pending *sub nom. Buckley v. McRae* 76-694), makes this a case one which is, at the very least, capable of repetition yet evading review. *Carroll v. Princess Anne,* 393 U.S. 175, 178-9 (1968). In short, there still is ". . . the presence of an existing unresolved dispute which continues . . . ." *Bus Employees v. Missouri,* 374 U.S. 74, 78 (1963).

CONCLUSION

On the basis of the foregoing arguments and authorities, as well as those contained in the main brief for petitioners, it is respectfully requested that the opinion and order of the lower Court be reversed.

Respectfully submitted,

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